

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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JASON TOUTANT, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0432

Case Type: PA

DECISION NO. 38934

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Appearances:

Brian Thom, 430 Willow Circle, Mayville, Wisconsin, appearing on behalf of Jason Toutant.

Anfin Jaw, Department of Administration, 101 E. Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin appearing on behalf of the State of Wisconsin Department of Corrections.

**DECISION AND ORDER**

On February 4, 2021, Jason Toutant filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for one day without just cause by the State of Wisconsin Department of Corrections. The appeal was assigned to Examiner Raleigh Jones. A telephone hearing was held on April 19, 2021. The parties made oral argument at the conclusion of the hearing.

On April 28, 2021, Examiner Jones issued a Proposed Decision and Order affirming the one-day suspension by DOC. On May 3, 2021, Toutant filed objections to the Proposed Decision and Order. DOC did not file a reply by the deadline given of May 10, 2021.

Being fully advised on the premises and having considered the matter, the Commission makes and issues the following:

**FINDINGS OF FACT**

1. Jason Toutant is employed by the State of Wisconsin Department of Corrections as a correctional sergeant at the Dodge Correctional Institution (DCI) and had permanent status in class when he was suspended.

2. The Department of Corrections (DOC) is a state agency responsible for the operation of various correctional facilities, including DCI in Waupun, Wisconsin.

3. On January 27, 2020, Toutant was involved in an off-duty incident at an ice fishing event which was attended by DCI employees.

4. At the event, a female coworker took off her coat, whereupon Toutant said he would give her a back rub. He did, and in doing so, Toutant put his hands on both her breasts and squeezed them. This touching was unwanted.

5. Toutant was later charged with fourth degree sexual assault. The fourth-degree sexual assault charge was eventually dismissed, and Toutant plead no contest to an ordinance violation of disorderly conduct.

6. DOC suspended Toutant for one day for the incident referenced in Findings 3 and 4.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following:

### **CONCLUSIONS OF LAW**

1. The Wisconsin Employment Relations Commission has jurisdiction over this appeal pursuant to Wis. Stat. § 230.44 (1)(c).

2. The State of Wisconsin Department of Corrections had just cause within the meaning of Wis. Stat. § 230.34(1)(a) to suspend Jason Toutant for one day.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following:

### **ORDER**

The one-day suspension of Jason Toutant by the State of Wisconsin Department of Corrections is affirmed.

Issued at Madison, Wisconsin, this 13<sup>th</sup> day of May, 2021.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman

**MEMORANDUM ACCOMPANYING DECISION AND ORDER**

Section 230.34(1)(a), Stats., states in pertinent part:

An employee with permanent status in class ... may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause.

Section 230.44(1)(c), Stats., provides that a State employee with permanent status in class:

... may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission ... if the appeal alleges that the decision was not based on just cause.

Toutant had permanent status in class at the time of his suspension and his appeal alleges that the suspension was not based on just cause.

The State has the burden of proof to establish that Toutant was guilty of the alleged misconduct and whether the misconduct constitutes just cause for the discipline imposed. *Reinke v. Personnel Bd.*, 53 Wis.2d 123 (1971); *Safransky v. Personnel Bd.*, 62 Wis.2d 464 (1974).

On January 27, 2020, Toutant was involved in the following incident at an ice fishing event attended by numerous DCI employees. A female coworker (JS), who did not know Toutant, took off her coat, whereupon Toutant said he would give her a back rub. He did, and in doing so, put his hands on both her breasts over her clothing and squeezed them. About ten seconds elapsed from the time Toutant put his hands on JS's back to his touching her breasts. After he did this, JS immediately told Toutant that the touching was unwanted, and she did not give consent for him to do that. That ended the encounter.

The next workday, JS received an email from Toutant that stated, "I wanted to apologize for yesterday. I feel horrible about that and I have no excuses. I was inappropriate and I am sorry." JS replied to this email stating, "I appreciate the apology. It's all good let's move on from it! Just remember I'm not a piece of meat!"

On February 3, 2020, JS reported what Toutant did to her at the ice fishing event to DOC via an intake interview. An intake is an internal DOC complaint against another employee. After it received the intake, DOC began an investigation into the matter.

That same day, JS reported this incident to the Dodge County Sheriff's Office. A deputy subsequently interviewed JS, Toutant and another witness. Afterwards the deputy drafted an incident report wherein he asked the Dodge County District Attorney's Office to bring charges of fourth degree sexual assault and disorderly conduct against Toutant. Later that month, the District Attorney's Office did that.

DOC has a work rule that says whenever an employee has "police contact" they are to notify their supervisor in writing of their police contact within a certain time frame. Toutant complied with this directive and notified DCI personnel of his police contact on February 4, 2020

and of his pending court hearings. DOC placed him on administrative leave the next day. DOC later temporarily transferred Toutant to work in another prison.

DOC's investigator ultimately interviewed 18 employees and prepared an 81-page report. In his interview, Toutant admitted that while he was giving JS a back rub, his hands ended up on her breasts. According to Toutant, that was completely accidental, and his hands were only on her breasts for a second.

In August 2020, JS resigned her DOC position because of the harassment she received over this matter.

In November 2020, Toutant plead no contest to an ordinance violation of disorderly conduct. The fourth-degree sexual assault charge against him was dismissed.

On December 8, 2020, DOC suspended Toutant for one day for his conduct toward JS on January 27, 2020.

Before we address the charge against Toutant, we are first going to address the following due process claim which he raised. Toutant objects to the length of time it took DOC to discipline him. He notes in this regard that he was interviewed in March of 2020 and the discipline was not imposed until nine months later. According to Toutant, his discipline should be rejected because it was issued in an untimely fashion. The Commission finds otherwise. Investigations sometime take a long time to complete, particularly where 18 employees are interviewed, and an 81-page investigative report is completed (as happened here). Additionally, there is no requirement that a state employee disciplinary investigation be completed, and discipline imposed, within a certain timeframe. Finally, while we will also address this matter later, it is noteworthy that DOC decided to wait until the criminal charges against Toutant were adjudicated before it decided on its course of action. Toutant's criminal charges were adjudicated on November 11, 2020 and he was disciplined on December 8, 2020. This claim is therefore rejected.

Having dealt with that preliminary matter, we are now going to address the fact that Toutant was off duty at the time of the January 27, 2020 incident. That is important, of course, because there is a difference between engaging in off-duty misconduct as opposed to on-duty misconduct. Here is why. When an employee commits misconduct while on-duty, its nexus to the workplace is usually considered obvious. In contrast, when the employee commits misconduct while off-duty, the nexus to the workplace is less obvious. Because of that, the employer has to show that a nexus exists between the employee's off-duty misconduct and the employer's legitimate business interests.

We find DOC showed that nexus here. Our rationale follows.

It is noted at the outset that DOC has a work rule that applies to off-duty conduct, namely work rule is #25. It provides:

Engaging in any outside activities (including violations or convictions of criminal or other laws) which may impair the employee's independence of judgment or impair the employee's ability to perform his/her duties as an employee of the state.

This work rule is very broad in that the phrase "violations or convictions of criminal or other laws" does not specify what type of violation or conviction is needed. That being so, it applies to the entire gamut of "violations or convictions" that are possible (i.e. ordinance, misdemeanor or felony).

Application of this work rule here yields the following results. Toutant was originally charged with fourth degree sexual assault. While sometimes employers impose discipline on employees facing criminal charges before those charges are adjudicated, that did not happen here. Instead, as was its right, DOC waited until the criminal charges against Toutant were adjudicated before it imposed discipline on him. While Toutant thinks it is significant that his ultimate conviction was not for misdemeanor fourth degree sexual assault, but rather for an ordinance violation of disorderly conduct, it was still something covered by work rule #25. Additionally, the following factors show a nexus between this conviction and Toutant's DOC employment. First, the incident occurred at a DCI ice fishing event that was attended by dozens of DCI employees. Second, JS was a fellow DCI employee. Third, Toutant is a sergeant and JS was a subordinate in the workplace.

Aside from the nexus just identified, Toutant's suspension letter also opined on DOC's view of the proverbial big picture connection between Toutant's off duty conduct and his duties as a correctional sergeant. It provided thus:

The Department and its employees have a legal responsibility to the public to ensure that correctional, rehabilitation and treatment programs are carried out in a legal, effective, safe and humane manner. As such, employees are held to a higher standard of expectations regarding their conduct both on and off duty. Executive Directive 42 is clear in stating an employee who is charged with or convicted of an offense occurring on or off duty may be subject to discipline for the conduct which gave rise to the charge or conviction if it meets the just cause threshold.

As a Correctional Sergeant, you are expected to adhere to the laws of the State of Wisconsin and to set an example for the persons in our care that you supervise. You are expected to be a positive rehabilitative influence through your conduct both on and off duty as a correctional officer. However, your conduct on January 27, 2020 is not demonstrative of your ability to serve as such influence or example to the people and community you serve. . . . The Department does not tolerate or condone your behavior.

The Commission concurs with that reasoning. We therefore find that Toutant's off duty conduct at the ice fishing event towards JS impaired and adversely affected his ability to perform his job duties.

Given the foregoing, the Commission concludes that Toutant engaged in misconduct for which he could be disciplined.

The focus now turns to the discipline which was imposed. Toutant contends he should have received a letter of expectation and that a one-day suspension was excessive under the circumstances. An employee who raises a disparate treatment claim has the burden of proving that contention.

For disparate treatment to occur, similarly situated employees must have engaged in similar conduct with different levels of discipline imposed. To support his disparate treatment claim, Toutant relies on the discipline imposed on two DCI employees. It is Toutant's view that he was punished more harshly than they were. He first relies on the situation involving Ritschke. Ritschke intentionally hugged a female subordinate at work in front of other DOC employees. This hug was unwanted and unsolicited by the employee who received it and given without her permission. The hug made her feel uncomfortable. Ritschke supervised the employee who he hugged. The reason he hugged her was because, by his own admission, he had a "crush" on her. DOC decided Ritschke's conduct was misconduct and suspended him for one day. He grieved that discipline, and it was eventually reduced to a letter of expectation. The question before the Commission is whether the Ritschke case can be considered a true comparable to the facts involved here. We find it cannot for these reasons. First, while Ritschke obviously touched the female employee when he hugged her, he did not intentionally put his hands on her breasts as part of his hug. Thus, Ritschke did not use his hands to touch the woman's breasts (which is what Toutant did). Second, Ritschke's actions were not subsequently investigated by the police nor was he charged with a crime (while Toutant was). Finally, Ritschke did not ultimately plead no contest to an ordinance violation of disorderly conduct (while Toutant did). In our view, these factual differences establish that the Ritschke matter is not a true comparable to Toutant's situation. Thus, the fact that Ritschke ultimately got a letter of expectation for his misconduct did not bind DOC to do the same thing to Toutant. Second, Toutant relies on a situation where Moreland was involved in off duty misconduct which led to his being arrested and charged with disorderly conduct and domestic abuse. He was ultimately convicted of misdemeanor disorderly conduct. He received a one-day suspension. Moreland's suspension letter provided in pertinent part:

The arrest was a result of a verbal argument you had with your wife while seated in your vehicle. During the argument, you hit the windshield with your fist, cracking the windshield before exiting the vehicle to walk home. Law enforcement were responding to a call involving you and your wife when they intercepted you while you were on foot. . . . You indicated [to DOC investigators] that you were upset because while at a bar prior to this incident, a gentleman approached your wife and offered her an illegal substance. You also indicated that as the arguing and yelling continued, you became frustrated, and that is when you punched the windshield.

Moreland's situation can fairly be summarized thus: he was in a bar with his wife, a guy approached her and offered her an illegal substance, Moreland got mad and he and his wife had an argument about it which resulted in police contact. It is Toutant's view that Moreland's misconduct

was “worse” than his, but Moreland received the same discipline that he did. Toutant cries foul over that. However, even if Moreland’s off duty misconduct was “worse” than Toutant’s because Moreland was convicted of a misdemeanor while Toutant’s conviction was for an ordinance violation, the facts in the Moreland case are not remotely comparable to what happened here. Since the facts in the Moreland matter are distinguishable from what happened here, the Moreland matter is not a true comparable to Toutant’s situation either. That being so, Toutant did not show he was subjected to disparate treatment in terms of the punishment imposed.

We therefore find that a one-day suspension was not an excessive punishment for Toutant’s misconduct. In so finding it is expressly noted that a one-day suspension is the first step in DOC’s progressive discipline sequence.<sup>1</sup>

Given the foregoing, it is concluded there was just cause for Toutant’s one-day suspension and it is therefore affirmed.<sup>2</sup>

Issued at the City of Madison, Wisconsin, this 13<sup>th</sup> day of May, 2021.

## WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James J. Daley, Chairman

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<sup>1</sup> As part of his requested remedy, Toutant also asks the Commission to award him the 2021 hazard duty merit pay which he did not receive. Here is some context for this claim. In response to COVID, the State created hazard duty merit pay awards. These discretionary pay awards were specifically authorized by DOA under the Discretionary Merit Compensation (DMC) program governed by the State Compensation Plan and were awarded in 2021. One of the DOC eligibility requirements is for employees to be discipline free within the past 24 months. Because of the discipline imposed in this matter, Toutant did not qualify for that merit pay and was denied same. In *Coyle v. DHS*, Dec. No. 38818 (WERC, 3/21), we found that we lack jurisdiction to review the merits of hazard duty merit pay claims. Consequently, we do not address this claim.

<sup>2</sup> It is unclear as to why Toutant received a mere one-day suspension. DOC could have skipped levels of progressive discipline in this instance, up to and including discharge. Had it done so the Commission likely would have upheld that discipline given the serious nature of Toutant's actions.